

June 11, 2007

Chairman Kevin J. Martin  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

*Re:* CS Docket No. 97-80

Dear Chairman Martin:

The undersigned public interest organizations are writing to express our concerns with the cable industry's plan to use the successor to CableCARD to limit competition and reduce choice in the consumer electronics marketplace. We appreciate your continued efforts to ensure that consumers benefit from the set-top box competition that Congress intended to promote in Section 629 of the Telecommunications Act of 1996. We urge you to continue these efforts and to ensure that all voices are heard in the debate over what standards will guide the future of television.

Specifically, we request that the Commission begin a rulemaking proceeding to solicit comment on the Consumer Electronics Association's November 7, 2006 "Proposal for Bi-Directional Digital Cable Compatibility and Related Issues" filed in the above-referenced docket. In addition, we ask that the Commission seek comment on ways to ensure that whatever technology replaces CableCARD does not restrict consumers' right to make lawful use of the content they have purchased. Finally, consumers and consumer interest groups, and not just the cable and electronics industries, need to be part of this discussion. Therefore, we ask that the Commission require that all future industry negotiations concerning bidirectional cable compatibility include public interest representatives.

### **Background**

In recent years, the cable industry has used new technology, such as Video On Demand (VOD), to increase consumer choice by permitting cable companies to offer their customers a greater range of programming. They accomplish this by using a more sophisticated technological means of delivering content to consumers. Rather than simply sending all channels down the wire to everyone, regardless of whether they are being watched, the technology employed in VOD only sends customers content they have requested. Recently, cable operators have started to employ similar bi-directional technology, such as Switched Digital Video (SDV), to increase bandwidth for the deployment of additional cable programming channels. In the case of SDV, this happens in a behind-the-scenes way: merely tuning in to an SDV channel "requests" it, and it starts displaying almost immediately. Technologies such as these break the traditional broadcasting, one-to-many paradigm, and enable the cable industry to provide their customers with a greater range of services as well as enhancements like high-definition programming.

But these same technological innovations should not be used as a means to limit competition. Right now, consumers who use third-party CableCARD devices rather than proprietary set-top boxes may be penalized and not able to use the full range of services they

subscribe to. In some markets, whole swathes of SDV channels may be shut off to them, as well as services like VOD.

This is inconsistent with the letter and spirit of Section 629 of Telecommunications Act of 1996, which sought to create a viable market for third-party video hardware<sup>1</sup>. In order to comply with the law, the cable industry needs to allow third-party hardware manufacturers to make devices that are compatible with all video services. The technological reason for this lack of compatibility— that services like VOD and SDV require two-way communication between the device and the cable head-end— is not a distinction that the law recognizes, nor one that policy should hinge on. From a consumer standpoint, there is no difference between an SDV channel and any other cable channel. Accordingly, policy distinctions among different video services should depend on whether those services are of the kind that a consumer would normally consider to be video programming. Cable companies should not be allowed to evade the law by noting that a particular service is “two-way” or “interactive.”

### **The CableLabs Proposal**

Even the cable industry has realized that the current situation is untenable. They propose: (1) a software-based successor to CableCard, known as the Downloadable Conditional Access system (DCAS); and (2) that in order to provide bidirectional capability to devices that use DCAS, a technology called OpenCable Application Platform (OCAP) be used. In allowing retail devices to receive and decode encrypted services, DCAS performs the same separable security function as CableCARD. There is no technical reason why DCAS should require the use of OCAP. By artificially tying DCAS to OCAP, CableLabs stifles innovation by taking the user experience away from the hardware manufacturer.

The CableLabs requirement that all DCAS devices use OCAP limits competition by giving the cable industry undue control over the customer’s equipment. OCAP is not necessary to provide bidirectional capability to retail devices. By design, OCAP has no support for services like VOD and SDV. Rather, OCAP is a platform upon which applications that support these services may run— and those applications are available only from the cable operator. OCAP takes control over customers’ devices by requiring that they use these proprietary applications to access services like VOD, or enhanced program guides. By doing this, it limits a hardware manufacturer’s ability to present its customers with a unified and logical graphical user interface. OCAP gives control of the look and feel of a device over to the cable operator. By limiting a hardware manufacturer’s ability to innovate and differentiate its products, OCAP reduces choice and competition in the marketplace.

Even if the forced link to OCAP were severed, DCAS has additional flaws that make it harmful to consumers. Unlike the current one-way CableCARD specifications, which were

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<sup>1</sup> “The Commission shall ... adopt regulations to assure the commercial availability to consumers ... of converter boxes, interactive communications equipment, and other equipment used by consumers to access ... video programming and other services offered over ... video programming systems, from manufacturers, retailers, and other vendors not affiliated with any ... video programming distributor.” 47 USC § 549.

created and defined within open, ANSI-accredited standards bodies, the DCAS specifications are being designed in isolation by CableLabs, a secretive organization funded and controlled by the cable industry. Any third parties wishing to get access to the specifications must sign onerous non-disclosure agreements, and even then are not allowed to participate in helping define those specifications. Furthermore, unlike CableCARD, there is no guarantee from the cable operators that they will support DCAS if and when it is available. In theory, a software-based solution like DCAS could reduce the cost of consumer devices and make it easier for consumers to purchase and set up their own equipment. But until the process is opened up to third parties, there is no way this can be verified and it should not be taken on faith.

The CableLabs DCAS/OCAP “solution” is designed and licensed to limit a third-party hardware manufacturer’s ability to offer its customers innovative features without first getting the cable industry’s permission. Furthermore, it reduces a manufacturer’s ability to provide consistent, elegant user interfaces on their devices. Competition, choice and innovation are beneficial to consumers; one-size-fits-all approaches designed by the cable industry are not.

### **The CEA Proposal**

On November 7, 2006, the Consumer Electronics Association and others submitted a proposal that offers a solution for giving access to SDV, VOD and other functions to consumer devices, with or without the use of OCAP. We believe that the CEA proposal makes a number of good suggestions.

The CEA proposal would make OCAP optional for third-party hardware manufacturers. Because OCAP is not necessary to provide bi-directional capability to consumer devices, video and other informational services should be available without it. Certain kinds of advanced interactive applications (as opposed to video programming), however, may require an OCAP-like technology. If the services offered by the cable companies are compelling, consumers will prefer OCAP devices. The highly competitive consumer electronics industry has proven adept at responding to consumer demand. Additionally, consumer electronics companies are more likely to support DCAS were the OCAP requirement to be removed. DCAS has the potential to reduce cost and complexity in consumer devices, but that potential is being blocked by the tie-in with OCAP. Additionally, were OCAP to be optional and not mandatory, third-party hardware manufacturers would be in a stronger position to negotiate more favorable licensing terms for the technology.

Under the CEA proposal, it would be possible for a consumer electronics device to integrate the cable program guide with offerings from over-the-air broadcast television (for example, through an ATSC antenna) and from the Internet (such as YouTube). The CEA proposal would allow a consumer electronics manufacturer to provide these services in a logical, unified way, sparing the consumer from having to switch between different applications and modes on his device. Under the CEA proposal, this burden to consumers is lifted and a single, integrated service guide is possible.

We agree with the CEA that the technical standards which underpin the cable industry ought to be in the control of an ANSI-accredited standards-setting body, and not CableLabs, an entity entirely controlled by the cable industry. To allow the cable industry to write the

rules its competitors must follow limits competition and locks out flexible and innovative features from consumers. The CEA proposal ensures that the cable industry cannot use the certification process to block out competitors, and prevents cable companies from discriminating against customers who use third-party hardware. Fair and open technical standards are required, not more proprietary and anti-competitive ones.

The CEA has articulated other principles that any plan for a bi-directional solution should include, and its proposal does much more than the CableLabs proposal to safeguard consumer rights.

### **Lawful Uses of Video Content**

Neither the CableLabs nor the CEA proposals address the important issue of consumers' ability to make lawful use of the content that they have legally obtained. Consumers expect to be able to record, time-shift, and place-shift. Technologies should enable a consumer to move content from one device to another, share content within a "personal network," and discuss and comment on it using media clips. The content industry's understandable desire to prevent piracy should not prevent consumers from making lawful use of content for which they have paid. The cable and the consumer electronics industries have attempted to advocate for their customers' right to be free from undue restrictions, but their efforts have fallen short. Therefore, the FCC must ensure that the public interest is served by not allowing the content industry to dictate the terms under which other industries and consumers may operate, and, as discussed below, by giving consumers the ability to participate in future discussions about this matter.

Moreover, the Commission should consider express encoding rules designed to ensure that "content protection" mechanisms do not unduly burden innovative uses of content after it is legitimately received by consumers. It is for copyright law, not "content protection" technologies approved by the Commission, to decide what consumer activities are or are not permitted after legitimate reception. Only if the Commission weighs in with appropriate encoding rules can consumers be confident that the free market will continue to provide the kinds of innovative technologies that have fueled the digital revolution.

### **Need for a Consumer Advocate**

While the involved industries may sometimes advocate policies that incidentally serve the public interest, this is no substitute for a real consumer presence. Therefore, we ask that the Commission require that public interest representatives be present at all future negotiations between the cable and consumer electronics industries concerning bidirectional cable compatibility. Consumer advocates would make sure the consumer viewpoint is represented and that the future of television is not dominated by the same narrow interests.

### **Conclusion**

Technological change should be used as an opportunity to enable, not limit consumer choice. The cable industry can continue to innovate without locking out competition. Furthermore, new technologies should never be used as opportunities to restrict and control customers, either in their choices in the marketplace or in their ability to make legal use of the

content they have purchased. The Commission should enforce 47 USC § 549 by ensuring that consumers have access to video programming through the use of third-party hardware without the requirement to use OCAP. We urge the Commission to commence a rulemaking to seek comment on the CEA proposal, and to safeguard a consumer's lawful use rights.

Sincerely,

Consumer Federation of America  
Consumers Union  
Electronic Frontier Foundation  
Free Press  
Knowledge Ecology International  
Media Access Project  
New America Foundation  
Public Knowledge  
U.S. Public Interest Research Group

cc: Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
Michelle Carey  
Scott M. Deutchman  
Rudy Brioché  
Aaron Goldberger  
Cristina Chou Pauzé  
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